93-257

No.

Supreme Court U.S.
FILED
AUG 18 1993
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

EDWARD RONWIN,

Petitioner,

vs.

SMITH BARNEY, HARRIS UPHAM & CO., INC., and JOHN SPAUSTAT,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Edward Ronwin
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38 pp

QUESTION FOR REVIEW

Were this Court's decisions in Rodriquez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 109 S.Ct. 1917 (1989) and Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 107 S.Ct. 2332 (1987), reh. den. 483 U.S. 1056, warrants to securities brokers to deny customer statutory rights to choose a judicial forum and to confine customers to arbitration only of customer/broker disputes?

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

EDWARD RONWIN, Petitioner,

vs.

SMITH BARNEY, HARRIS UPHAM & CO., INC., and JOHN SPAUSTAT, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

On June 24, 1993, the U.S. Court of Appeals for the Eighth Circuit entered an unpublished Opinion, and a separate Judgment affirming the district court's Opinion; See Appendix, A-1, A-2. On or about June 30, 1993, Petitioner, ("RONWIN") filed a timely Petition for Rehearing and the

court of appeals entered a denial of same on July 21, 1993, A-3.

On October 29, 1992, the U.S. District Court for the District of Nebraska entered a Judgment, A-16, and a separate Order and Memorandum, ("DIST CT OPINION"), A-3, et seq.. DIST CT OPINION has been published at 807 F.Supp. 87 (D.Neb. 1992).

JURISDICTION

This Petition for Writ of Certiorari is being filed within 90 days after the court of appeal's denial of RONWIN's Petition for Rehearing entered July 21, 1993. The rehearing was requested on the court of appeal's Opinion, A-1 and Judgment, A-2, both entered on June 24, 1993. This Court's jurisdiction is invoked under 28 U.S.C., Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 15, Sec. 77v(a)

The district courts of the United States,

BEST AVAILA

...shall have jurisdiction of offenses and violations under this subchapter, and concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. United States Code,Title 15, Sec. 78aa

The district courts of the United States ...shall have exclusive jurisdiction of violations of this chapter...and of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter...

STATEMENT OF THE CASE

On January 15, 1992, RONWIN executed a customer agreement with SMITH BARNEY, HARRIS UPHAM & CO., INC., ("SB," which will include as the use implies SB's Omaha office manager, JOHN SPAUSTAT, ("SPAUSTAT")), for a cash only securities account. Prior to entering the agreement, RONWIN objected to the pre-dispute

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arbitration clause and SB's representative agreed to delete same. That is an essential distinction between this case and the facts in Rodriquez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 109 S.Ct. 1917 (1989), and in Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 107 S.Ct. 2332 (1987), where the customers signed agreements containing predispute arbitration clauses and, after a dispute erupted, urged that arbitration clauses were prohibited by the 15 U.S.C., Secs. 77v and 78aa, and this Court's decision in Wilko v. Swan, 346 U.S. 427, 74 S.Ct. 182 (1953); See, Rodriquez, 107 S.Ct. @ 1918-19, and McMahon, 482 U.S. @ 222-226, 107 S.Ct. @ 2335-2337.

Later that day, Jan. 15, 1992, SPAUSTAT reversed SB's position and, after further interaction between SB and RONWIN, SB refused service to RONWIN and unilaterally closed the account.

On May 6, 1992, RONWIN filed a four-Count Complaint: Count I [unenforceable] contract of adhesion; Count II, violation of Securities Acts; Count III, breach of contract and Count IV, breach of fiduciary duty. The jurisdictional bases pled were: 15 U.S.C, Secs. 77v, 78aa; 28 U.S.C., Secs. 1331, 1332, 1337 and 1367. SB met the Complaint with a motion to dismiss and to strike and RONWIN filed a motion for partial summary judgment. October 29, 1992, the district court entered Judgment and the separate DIST CT OPINION, A-3 et seq., dismissing all Counts.

The district court's reasons for said dismissal is of import to this Petition.

As to Count II, DIST CT OPINION contended that, A-9 to A-10; 807 F.Supp. @ 89:

> The essence of Ronwin's contention is that these Acts, at Sec. 22 of the Securities Act of 1933 (15 U.S.C., Sec. 77v) and at Sec. 27 of the Securities Exchange Act of 1934 (15 U.S.C., Sec 78aa), vest exclusive jurisdiction for violations of the

> respective Acts in the district courts of the United States; the pre-dispute arbitration clause, Ronwin argues, constitute a waiver of compliance with those respective provisions...

and, the district court added (correctly) that McMahon rejected that argument, A-11.

Based upon the quoted contention, the district court dismissed Count II, A-11; 807 F.Supp. @ 90.

The district court's contention was not only incorrect, but utterly contrary to RONWIN's stated position as found in [RONWIN's] Brief in Support of [RONWIN's] Response to Defendants' Motions to Dismiss and to Strike, p. 9:

> Thus, the element central to both McMahon and Rodriquez reduced to a question of whether the arbitration clause accepted by the customers in each case could be enforced to require the customer-claimants to arbitrate the disputes each had with the broker/dealer, (the same firm in both cases), and which arose in each case subsequent to the execution of the respective customer agreements or whether the right to a judicial forum provided

> in 15 U.S.C., Sec. 77a, et seq., and 15 U.S.C., Sec. 78a, et seq., excluded arbitral forums pursuant to the provisions of 15 U.S.C., Sec. 77n and 15 U.S.C., Sec. 78cc, respectively. That question is not an issue, central or otherwise, in this action. (emphasis added).

Not only did RONWIN clearly inform the district court that the posture on Count II which said court ascribed to RONWIN was inaccurate, but the district court's contention, upon which it dismissed Count II, is nowhere to be found in the record below.

An analogous situation occurred as to Count I. DIST CT OPINION alleged and dismissed Count I on the following grounds, A-8; 807 F.Supp. @ 89:

> Ronwin has made no allegation of unconscionability separate from the general assertion that the predispute arbitration clause is a contract of adhesion, and the apparent, albeit erroneous, presumption that all such clauses are inherently unconscionable. Count I of the complaint must accordingly be dismissed for failure to state a claim.

The district court's allegation is at odds with the record below. Under Count I, RONWIN pled, Para. XVII, pp. 5-6:

> The actions of the Defendants in demanding as a condition for the provision of their Federal and State regulated services...[that] RONWIN and any other prospective customer unconditionally accept said pre-dispute arbitration clause, and thereby denying RONWIN...the free choice of whether or not to agree to said predispute arbitration clause, whether for a cash or a margin account, and denying to RONWIN...the right to seek redress of grievances...in the Courts of the United States and/or in the Courts of the several states, constitute a contract of adhesion and/or an impermissible demand for same, and said action by SB is against public policy, unenforceable and an unconscionable business tactic.

Contrary to the district court's contention, RONWIN certainly did not plead that all broker/customer agreements containing predispute arbitration clauses are "contracts of adhesion" and, consequently, "inherently unconscionable"; rather, RONWIN pled that the reason the predispute arbitration clause in SB's customer agreement becomes

a "contract of adhesion" and an "unconscionable business tactic" is that, as RONWIN had pled, SB refuses service to RONWIN unless RONWIN "unconditionally accepts said predispute arbitration clause."

There was no pleading by RONWIN, apparent or otherwise, of an "albeit erroneous, presumption that all such [predispute arbitration] clauses are inherently unconscionable."

In [RONWIN's] Brief in Support of [RONWIN's] Response to [SB's] Motions to Dismiss and to Strike, p. 7, RONWIN told the district court:

> ..To emphasize the point: The complaint does not challenge the provisions of the Federal Arbitration Act, 9 U.S.C., Sec. 1, et seq.; and agrees that an arbitral forum can replace a statutorily provided judicial forum in the securities area, as in other fields, but, the Complaint insists in line with Rodriquez that the agreement to arbitrate must be an unfettered choice of the customer and not required as a non-negotiable demand by the broker/dealers... (emphasis supplied).

As to Counts III and IV, the district court found that diversity jurisdiction existed, A-13; but dismissed both Counts, A-13. Count III was dismissed on the grounds that SB allegedly could breach its contract at will, A-13,A-14; 807 F.Supp. @ 90, and Count IV was dismissed because the other Counts had been dismissed, as failing to state a claim, A-14,A-15; 807 F.Supp. @ 90-91.

It is pertinent that SB's forcing of predispute arbitration clauses on customers was found by the district court to be an industry-wide practice, A-7; 807 F.Supp. @ 89.

A timely notice of appeal was filed on November 30, 1992. Jurisdiction in the court of appeals was based on 28 U.S.C., Secs. 1291 and 1294. The Court of Appeals for the Eighth Circuit entered both a brief Opinion, A-1, and a separate Judgment, A-2, on June 24, 1993. The brief Opinion

merely states the court of appeal's approval of the entire district court opinion. On or about June 30, 1993, RONWIN filed a timely Petition for Rehearing. On July 21, 1993, the court of appeals denied the petition without comment, A-3.

REASONS FOR THE WRIT

In justification of this Court's expansion of the terms of 28 U.S.C., Secs. 77v and 78aa, to allow arbitral forums, this Court wrote in Rodriquez, 490 U.S. @ 482-483, 109 S.Ct. @ 1921:

> ..to advance the objective of allowing buyers of securities a broader right to select the forum for resolving disputes, whether it be judicial or otherwise...

Placing the right to select the forum, judicial or arbitral, in the customer's lap is consistent with this Court's repeated recognition that the Securities Acts of 1933 and 1934 were enacted for the benefit of, and protection of, customers, as noted in Rodriquez, 490 U.S.

@ 484, 109 S.Ct. @ 1921:

> This avenue of relief is in harmony with the Securities Acts' concern to protect buyers of securities by removing 'the disadvantages under which buyers labor' in their dealings with sellers [citing] Wilko, 346 U.S. @ 435, 74 S.Ct. @ 187...

Accord: Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194-195, 96 S.Ct. 1375, 1381-1382, 47 L.Ed.2d 668 (1976), reh. den. 425 U.S. 986; United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 849, 95 S.Ct. 2051, 2059, 44 L.Ed.2d 621 (1975), reh. den. 423 U.S. 884.

SB's practice of forcing customers or prospective customers to accept a predispute arbitration clause in its customer agreements, which is an industry-wide practice:

1. Denied RONWIN's "right to select the forum...whether it be judicial or [arbitral]," recognized under Rodriquez. A "right to select the forum...is a substantial right," Boyd v. Grand Trunk Western

R. Co., 338 U.S. 263, 266, 70 S.Ct. 26, 28, 94 L.Ed. 55 (1949); which right ultimately springs from fundamental constitutional rights under the First, Fifth and Fourteenth Amendments, Harrison v. Springdale Water & Sewer Com., 780 F.2d 1422, 1427-1428 (8th Cir. 1986); Simmons v. Dickhaut, 804 F.2d 182, 183 (1st Cir. 1986); and,

2. Unilaterally voids the above-quoted terms, 2-3 above, of 28 U.S.C., Secs. 77v and 78aa, which allow the choice of judicial forums; and,

3. Violates the public policy of the United States, Kennett v. Chambers, 55 U.S. 38, 51, 14 L.Ed. 316 (1852); and,

4. Makes SB's predispute arbitration clauses, unenforceable contracts of adhesion.

The district court's opinion, approved by the court of appeals, runs diametrically contrary to this Court's decisions as cited and quoted above.

A second reason for granting the Writ of Certiorari is that this Court held in McMahon, 482 U.S. @ 230-231, 107 S.Ct. @ 2339-2340:

> Section 29a, [15 U.S.C., Sec. 78cc(a)] is concerned, not with whether brokers 'maneuver[ed customers] into' an agreement, but with whether the agreement 'weaken[s] their ability to recover under the [Exchange] Act. [Wilko v. Swan], 346 U.S., at 432, 74 S.Ct., at 185. The former is grounds for revoking the contract under ordinary principles of contract law; the latter is grounds for voiding the agreement under Section 29a. (2nd, 3rd and 4th brackets are in the original).

Clearly, RONWIN had a common law claim since the basis for the breach of the RONWIN/SB cash account agreement was RONWIN's refusal to be "maneuvered into" such an agreement if it contained a predispute arbitration clause, along with RONWIN's insistence on the right to choose a judicial forum rather than an arbitral forum if a dispute arose; See quotation from Complaint at 8, above. As

the district court found that diversity jurisdiction existed under Count III, there were no grounds to dismiss said Count, regardless of the merits, if any, of the district court's dismissal of the other Counts.

Importance of this Case

This action runs beyond RONWIN's own dispute with SB. Not only are large numbers of SB's securities customers equally and illegally denied constitutional and statutory rights recognized by this Court, but, as an industry-wide practice, millions of Americans are being forced to surrender their right to choose judicial forums rather than arbitral forums, contrary to constitutional right, statutory right and the decisions of this Court; and as bad, SB's action, and that of its fellow brokers, illegally voids statutes of Congress.

CONCLUSION

For the foregoing reasons, this Court is urged to grant the Writ sought so that this Court can make clear that it did not replace judicial forums with arbitral forums when it promulgated the Rodriquez and McMahon decisions, but merely enlarged the free choice of buyers of securities, i.e., the customers and prospective customers of securities brokerage establishments, to choose arbitral or judicial forums for customer/broker dispute resolution.

Respectfully submitted

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Petitioner pro se and
Attorney at Law (Iowa)

Dated: August 17, 1993

(Appendix follows)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

(CAPTION) * Appeal from the United States District Court for the District of Nebraska

[UNPUBLISHED]

Submitted: June 18, 1993
Filed: June 24, 1993

Before McMILLIAN, FAGG, and HANSEN, Circuit Judges.

PER CURIAM.

Edward Ronwin appeals the district court's order dismissing Ronwin's action for failure to state a claim on which relief can be granted. See Ronwin v. Smith Barney, Harris Upham & Co., 807 F.Supp. 87, 88 (D.Neb. 1992). We have nothing to add to the district court's well-reasoned opinion. Accordingly, we affirm on the basis of the district court's opinion. See 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3788NEO

(CAPTION) * Appeal from the United States * District Court for the District * of Nebraska *

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

June 24, 1993

A true copy.

ATTEST:

/s/ Michael E. Gans
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

MANDATE ISSUED 7/28/93

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3788NEO

(CAPTION) *Appeal from the United States
*District Court for the District
*of Nebraska
*

The petition for rehearing by the panel is denied.

July 21, 1993

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

EDWARD RONWIN, d/b/a Plaintiff, vs. SMITH BARNEY, HARRIS UPHAM & CO., INC., and JOHN SPAUSTAT, Defendants.	8:CV92-00232 **MEMORANDUM and ORDER**

THIS MATTER is before the Court on the Defendants' motion to dismiss and to strike (Filing No. 13). For the reasons

set out below, this action will be dismissed, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for failure to state a claim.

The plaintiff in this action, Edward Ronwin, doing business as Index Investments, alleges (Filing No. 1) that he had sought to open a securities account with defendant Smith Barney, Harris Upham & Co., Inc.; defendant John Spaustat is and was, at all times relevant, resident manager of Smith Barney's Omaha office. Ronwin alleges that he was initially permitted to open a cash account without signing an agreement containing a predispute arbitration agreement, but that Smith Barney later determined that it would not permit him to have an account without such an arbitration agreement and returned his money. Ronwin further alleges that he was damaged by the defendants' refusal to do business with him on his terms.

He seeks to recover compensatory and punitive damages and attorney fees, as well as injunctive relief.

Jurisdiction is asserted upon the bases of the existence of a federal question (28 U.S.C., Sec. 1331), diversity of citizenship (28 U.S.C., Sec 1332), commerce and antitrust regulations (28 U.S.C., Sec. 1337), upon supplemental jurisdiction pursuant to 28 U.S.C., Sec. 1367, and upon the Securities Act of 1933 (15 U.S.C., Sec. 77v) and the Securities Exchange Act of 1934 (15 U.S.C., Sec. 78aa).

The standards for dismissal pursuant to Rule 12(b)(6) are well established. In considering a motion to dismiss under F.R.Civ.P. 12(b)(6), the allegations in the complaint must be viewed in the light most favorable to the plaintiff. Fusco v. Xerox Corp., 676 F.2d 332, 334 (8th Cir. 1982). "[A] complaint should not be dismissed for failure to state a claim unless it appears be-

yond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (footnote omitted). "Thus, as a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which a plaintiff includes some insuperable bar to relief." Jackson Sawmill Co. v. United States, 580 F.2d 302, 306 (8th Cir. 1978), cert. denied, 439 U.S. 1070 (1979).

The Court finds this to be such a case.

In the first count of his complaint, Ronwin asserts that the defendants' insistence that he agree to the predispute arbitration clause as a condition of doing business with Smith Barney constitutes an attempt to impose an unenforceable contract of adhesion. He accordingly seeks to have Smith Barney enjoined from requiring such clauses as a prerequisite for accepting accounts, and seeks unspecified compensatory

and punitive damages, as well as attorney fees and costs.

This count of the plaintiff's complaint rests upon an erroneous presumption and must therefore be dismissed. The defendants do not deny, and this Court finds, that the contract in question is a contract of adhesion. Such contracts may be said to exist where, as here, a standardized form of agreement, drafted by the party with superior bargaining power, is presented to a party on a take it or leave it basis. As the plaintiff points out, and the defendants do not dispute, insistence upon such predispute arbitration clauses are an industry-wide practice.

However, the mere fact that a contract falls under the rubric of the adhesion doctrine does not make it unenforceable. See, e.g. Webb v. R. Rowland & Co., 800 F.2d 803, 807 (8th Cir. 1986) ("the use of a standard form contract between two parties of admittedly unequal bargaining

power does not invalidate an otherwise valid contractual provision. To be invalid, the provision at issue must be unconscionable"). See also Finkle and Ross v. A.G. Becker Paribas, Inc., 622 F.Supp. 1505, 1512 (S.D.N.Y. 1985) (holding that such contracts may be considered contracts of adhesion but are nonetheless enforceable in the absence of a showing of "unfairness, undue oppression or unconscionability").

Ronwin has made no allegation of unconscionability separate from that the (sic) general assertion that the predispute arbitration clause is a contract of adhesion, and the apparent, albeit erroneous, presumption that all such clauses are inherently unconscionable. Count I of the complaint must accordingly be dismissed for failure to state a claim.

In Count II of his complaint, Ronwin alleges that the defendants' insistence upon

the predispute arbitration clause was an attempt to impose a condition that violates Sec. 14 of the Securities Act of 1933 (15 U.S.C., Sec. 77n) and Sec. 29(a) of the Securities Exchange Act of 1934 (15 U.S.C., Sec 78cc). Each of those provisions forbids the imposition of "any condition, stipulation or provision binding any person to waive compliance with any provision [of the respective Acts]". Ronwin asserts that the predispute arbitration clause falls within those proscriptions. In this Count, Ronwin seeks compensatory and punitive damages, injunctive relief, and an award of attorney fees and costs.

The essence of Ronwin's contention is that these Acts, at Sec. 22 of the Securities Act of 1933 (15 U.S.C., Sec. 77v) and at Sec. 27 of the Securities Exchange Act of 1934 (15 U.S.C., Sec. 78aa), vest exclusive jurisdiction for violations of the respective Acts in the district courts

of the United States; the predispute arbitration clause, Ronwin argues, constitutes a waiver of compliance with those respective provisions.

This argument, in the context of the Securities Exchange Act of 1934, was considered and rejected by the Supreme Court of the United States in Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987). In McMahon the Court reasoned that

> The McMahons contend that an agreement to waive this jurisdictional provision is unenforceable because Sec. 29(a) voids the waiver of "any provision" of the Exchange Act. The language of Sec. 29(a), however, does not reach so far. What the anti-waiver provision of Sec. 29(a) forbids is enforcement of agreements to waive "compliance" with the provisions of the statute. But Sec. 27 itself does not impose any duty with which persons trading in securities must "comply." But its terms, Sec. 29(a) only prohibits waiver of the substantive obligations imposed by the Exchange Act. Because Sec. 27 does not impose any statutory duties, its waiver does not constitute a waiver of "compliance with any provision" of the Exchange Act under Sec. 29(a).

482 U.S. at 228. The Supreme Court expressly adapted that same reasoning to the Securities Act of 1933 in Rodriquez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). The predispute arbitration clause insisted upon by the defendants simply does not contravene the respective Acts; Count II of Ronwin's complaint must accordingly be dismissed for failure to state a claim.

The two remaining Counts of the plaintiff's complaint are based upon common law claims of breach of contract and breach of fiduciary duties. Having dismissed the Counts of the plaintiff's complaint which would have established jurisdiction on the basis of a federal question, securities laws or antitrust laws, or which would have provided a basis for supplemental jurisdiction, the Court must face the question of whether diversity jurisdiction remains pursuant to 28 U.S.C., Sec. 1332.

As further explained below, the Court finds that it does.

The burden of proof on a Rule 12(b)(I) motion is upon the party asserting jurisdiction. Estate of Blakely v. Asbestos Corp., 766 F.Supp. 721 (E.D. Ark. 1991); 12 Wright and Miller, Federal Practice & Procedure, Sec. 1350 (1990). Ronwin has clearly pled diversity among the parties (Filing No. 1 at Paras. II, III and IV), but has pled damages only "in an amount to be determined at trial" (Filing No. 1 at Paras. XVIII, XXI, XXIV, and the prayer for relief). Although the Court has serious doubts that the plaintiff would recover an amount in excess of Sec. 1332's $50,000 amount in controvery requirement, the Court is also cognizant that "the claim is deemed to have been made in good faith so long as it is not clear to a legal certainty that the claimant could not recover a judgment exceeding the jurisdictional amount."

Id. at 231. Accordingly, the Court holds that diversity jurisdiction exists.

Nonetheless, the Court further finds that these remaining two counts should be dismissed for failure to state a claim. Count III is a breach of contract claim in which Ronwin alleges that Smith Barney's refusal to permit Ronwin to participate in an account without a predispute arbitration agreement constituted a breach of the agreement for a cash account. However, it is uncontroverted that Smith Barney returned Ronwin's funds and the account was closed. See, e.g., Complaint (Filing No. 1) at Para. XV. Assuming arguendo that a contract had existed, Smith Barney clearly had the right to end the contract in the manner it did.

Notice to this Supreme Court:
The following portion of the decision did not appear on the pages supplied by the District Clerk's office, but was taken

from the published decision at 807 F.Supp. @90:

"The general rule is that contracts having no fixed term are terminable at will by either party." Martin v. Equitable Life Assurance Soc. of the United States, 553 F.2d 573, 574 (8th Cir.

End of portion missing from the copy of the decision distributed by the District Court Clerk's office.

1977); See also Federal Deposit Insurance Corp. v. Northwood Projects, Inc., 95 Misc.2d 373, 407 N.Y.S.2d 424 (1978) and Muller Enterprises v. Samuel Gerber, Advertising Agency, Inc., 182 Neb. 261, 153 N.W.2d 920 (8th Cir. 1967) (sic). Again, the plaintiff has failed to state a claim upon which relief could be granted.

Ronwin's fourth and final Count is premised upon an alleged breach of fiduciary duty. Assuming arguendo that a fiduciary relationship existed, Ronwin has simply

failed, for the reasons described above, to allege any circumstances that could conceivably constitute a breach of any fiduciary duty. This Count, like the others, must be dismissed for failure to state a claim. Accordingly,

(1) the motion on to (sic) dismiss (Filing No. 13) is granted;

(2) the plaintiff's motion for partial summary judgment (Filing No. 21) is denied as moot; and

(3) an Order of Dismissal consistent with this Memorandum and Order will be entered this date.

DATED this 29 day of October, 1992.

BY THE COURT:

/s/ William G. Cambridge
WILLIAM G. CAMBRIDGE,
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

EDWARD RONWIN, d/b/a (sic)) Plaintiff,	8:CV92-00232
vs.	
SMITH BARNEY, HARRIS UPHAM & CO., INC., and JOHN SPAUSTAT, Defendants.	**ENTRY OF JUDGMENT** (Filed Oct. 29, 1992)

In accordance with the Order entered this date, IT IS ORDERED that this matter is dismissed.

DATED this 29 day of October, 1992.

BY THE COURT:

/s/ William G. Cambridge
WILLIAM G. CAMBRIDGE,
United States District Court

Notice: The portion noted as missing from the District Court Clerk's copy of the Memorandum and Order, as supplied on pages A-12 and A-13, supra, and as found in 807 F.Supp. @90, was officially made part of the record below by an Amendment to Memorandum and Order filed January 20, 1993 by the District Clerk's office. Said Amendment was signed by Judge CAMBRIDGE on January 20, 1993.

(2)

Supreme Court, U.S.
FILED
OCT - 1 1993
OFFICE OF THE CLERK

NO. 93-257

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

EDWARD RONWIN, d/b/a INDEX INVESTMENTS,

Plaintiff-Petitioner,

v.

SMITH BARNEY, HARRIS UPHAM & CO., INC., and JOHN SPAUSTAT,

Defendants-Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should review the decision below that affirmed the District Court's dismissal of Petitioner's claims seeking damages and an injunction to force Respondent, a securities broker-dealer, to provide Petitioner with a securities brokerage account without a predispute arbitration agreement.

LIST OF PARENT COMPANIES AND SUBSIDIARIES

Pursuant to Supreme Court Rule 29.1, a list of the parent companies and non-wholly owned subsidiaries of Respondent Smith Barney, Harris, Upham & Co., Inc. (which is now known as Smith Barney Shearson Inc.) is as follows:

Primerica Corporation (parent)

Smith Barney Shearson Holdings Inc. (parent)

Smith Barney Shearson Europe Holdings, Ltd. (non-wholly owned subsidiary)

Smith Barney Shearson Europe, Ltd. (non-wholly owned subsidiary)

Smith Barney Shearson Futures, Ltd. (non-wholly owned subsidiary)

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NO. 93-257

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

EDWARD RONWIN, d/b/a INDEX INVESTMENTS,

Plaintiff-Petitioner,

v.

SMITH BARNEY, HARRIS, UPHAM & CO., INC. and JOHN SPAUSTAT,

Defendants-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

Respondents respectfully request this Court to deny Edward Ronwin's petition for writ of certiorari seeking review of the opinion of the Court of Appeals for the Eighth Circuit. This case does not present any important issues of federal law that should be decided by this Court, nor does it raise any conflicts that need resolution.

STATEMENT OF THE CASE

Petitioner, Edward Ronwin, is no newcomer to this Court. His Complaint in this action is simply one more in a series of frivolous complaints that he has filed on his own behalf in courts across the country.[1]

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[1] Mr. Ronwin has not only filed numerous frivolous suits on his own behalf, but he also has been chastised by the Arizona Supreme Court for doing so. The Arizona Supreme Court, sitting *en banc*, found Mr. Ronwin "not mentally able" to be admitted to the Arizona Bar, concluding in a lengthy opinion as follows:

> Ronwin has not established that he is mentally fit to practice law. Manifestations of improper conduct include the filing of unwarranted legal actions against numerous individuals connected with Ronwin's unhappy experience in applying for admission to the Arizona Bar. . . . The refusal to accept the finality of *Ronwin I*, followed by the filing of unwarranted, vexatious, and harassing actions constitutes grounds for denial of admission. We conclude further that applicant's use of intemperate, provocatory language and epithets; his lack of control, restraint and civility; and his custom of vilifying those who oppose him are all improper conduct for an attorney and constitute grounds for denial of admission.

In Re Matter of Ronwin, 136 Ariz. 566, 667 P.2d 1281, 1291 (1983) (*en banc*), *cert. denied sub nom.*, *Ronwin v. Supreme Court of Arizona*, 464 U.S. 977 (1983). *See In the Matter of Ronwin*, 139 Ariz. 576, 680 P.2d 107 (1983), *cert.*

(continued...)

As the facts are alleged in the Complaint, Ronwin attempted to open a margin securities account at Smith Barney, Harris, Upham & Co., Inc. ("Smith Barney"), a securities broker-dealer. Ronwin, who is an attorney, noted that the Smith Barney standard account agreement he was being asked to sign contained a predispute arbitration clause and he refused to sign the agreement. Certain Smith Barney personnel permitted Ronwin to open a cash securities account but not a margin account without a predispute arbitration

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[1](...continued)
denied sub nom., *Ronwin v. Supreme Court of Arizona*, 464 U.S. 977 (1983); *Application of Ronwin*, 113 Ariz. 357, 555 P.2d 315 (1976) *(en banc)*, *cert. denied sub nom.*, *Ronwin v. Special Committee on Examinations and Admissions of the Arizona Supreme Court*, 430 U.S. 907 (1977), *and cert. denied sub. nom.*, *Ronwin v. The Supreme Court of Arizona*, 439 U.S. 828 (1978). *See also Ronwin v. Holohan*, 479 U.S. 870 (1986); *Ronwin v. Supreme Court of Iowa*, 471 U.S. 1101 (1985); *Ronwin v. United States District Court for the District of Arizona*, 469 U.S. 1132 (1985); *Hoover v. Ronwin*, 466 U.S. 558 (1984); *In re Ronwin*, 465 U.S. 1004 (1984); *Ronwin v. Fair Employment Practices Commission*, 409 U.S. 811 (1972); *Ronwin v. Dunham*, 818 F.2d 675 (8th Cir. 1987); *Ronwin v. Von Ammon*, 688 F.2d 848 (9th Cir. 1982); *Ronwin v. Shapiro*, 657 F.2d 1071 (9th Cir. 1981); *Ronwin v. Segal*, 634 F.2d 636 (9th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Ronwin v. Piper, Jaffray & Hopwood, Inc.*, 113 Ill. App. 3d 587, 447 N.E.2d 954 (1983); *National Child Care, Inc. v. Dickinson*, 446 N.W.2d 810 (Iowa 1989).

agreement, to which Ronwin agreed. However, several hours later, the resident manager and broker at Smith Barney for the account, Respondent John Spaustat, heard what had transpired and immediately contacted Ronwin to advise him that he would not allow even a cash account to be opened without a predispute arbitration agreement. Ronwin still refused to sign the arbitration agreement, so Smith Barney closed Petitioner's account and refunded the money he had deposited.

Several months later, Ronwin brought this suit alleging, in four counts that he is entitled to an unspecified amount of compensatory and punitive damages, as well as a permanent injunction barring Smith Barney from requiring a predispute arbitration agreement as a condition for accepting a customer account. Ronwin's Count I is a purported cause of action for "contract of adhesion," in which Ronwin alleges that he and other prospective customers of Smith Barney have been denied "the free choice of whether or not to agree to said predispute arbitration clause, whether for a cash or margin account, and den[ied] . . . the right to seek redress of grievances . . . in the Courts . . ., [thereby] constituting a contract of adhesion and/or an impermissible demand for same and said action by SB [Smith Barney] is against public policy, unenforceable and an unconscionable business tactic."

Ronwin alleges that, with the exception of "several brokerage houses [that] will accept cash only accounts without the predispute arbitration agreements," the entire securities brokerage industry demands predispute arbitration agreements as a condition for the extension of securities brokerage services."

In Count II, Ronwin alleges that the conduct of Smith Barney and Spaustat violated the "antiwaiver" provisions of Section 14 of the Securities Act of 1933, 15 U.S.C. § 77n, and Section 29 of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc, which proscribe "any condition, stipulation or provision binding any person to waive compliance with any provision" of such Acts. Ronwin contends that these antiwaiver statutes protect his so-called "unfettered" right under those Acts to bring suit in the courts if he so chooses and to obtain a securities brokerage account without being required to sign a predispute arbitration agreement. Ronwin's Count III alleges breach of contract and Count IV alleges breach of fiduciary duty based on the same conduct as Counts I and II.

The District Court for the District of Nebraska dismissed Ronwin's Complaint, and the Court of Appeals for the Eighth Circuit affirmed in a one-paragraph opinion adopting the District Court's opinion. In dismissing Count I, the

District Court agreed that Smith Barney's predispute arbitration agreement was a contract of adhesion, but held that Ronwin had made no allegations showing that the contract was unconscionable, regardless of Ronwin's allegation that insistence upon such predispute arbitration clauses was an industry-wide practice. The District Court dismissed Count II on the ground that this Court's decisions in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), and *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), had held that the jurisdictional provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 did "'not impose any duty with which persons trading in securities must 'comply,'" whereas the antiwaiver provisions of those Acts only prohibited waiver of the substantive obligations of those Acts. Finally, the District Court dismissed Ronwin's Count III alleging breach of contract on the ground that the contract for Ronwin's cash account was terminable at will by Smith Barney, and the District Court dismissed Count IV on the ground that Ronwin, even assuming *arguendo* that a fiduciary duty had existed, had not alleged any circumstances that could constitute a breach of such duty.

In his Statement of the Case, Ronwin misconstrues the District Court's opinion in contending that the District Court

misstated his arguments on Counts I and II. The District Court correctly understood Ronwin's claims as disputing Smith Barney's refusal to provide him service unless Ronwin "unconditionally accept[ed]" the predispute arbitration clause and that Ronwin had refused to agree to such clause. Ronwin has conveniently ignored portions of the District Court's opinion, such as those that explained that Ronwin "seeks to have Smith Barney enjoined from requiring such clause as a prerequisite for accepting accounts . . . [, which clauses are] presented to a party on a take it or leave it basis. . ." and that "Ronwin alleges that the defendants' insistence upon the predispute arbitration clause was an attempt to impose a condition that violates Sec. 14 of the Securities Act of 1933 . . . and Sec. 29(a) of the Securities Exchange Act of 1934. . . ." *See* Appendix, at A-6 to A-9.

REASONS WHY THE PETITION SHOULD BE DENIED

The crux of Ronwin's claims is whether he has any right to compel Smith Barney to transact business with him on the contractual term he chooses—i.e., without a predispute arbitration agreement—when no statute, case law or agency regulation would require Smith Barney to agree to that term. Ronwin's claims are inconsistent with this Court's holdings in *Rodriguez* and *McMahon* and the federal presumption in favor of predispute arbitration agreements. Ronwin is urging this Court to fashion by "judicial legislation" a new law requiring a securities broker-dealer to provide brokerage services upon demand to all prospective customers without requiring that a predispute arbitration agreement be signed. Ronwin's "lobbying" efforts should properly be directed to Congress, the SEC or the appropriate self-regulatory bodies of the securities industry for the change in law or regulation he seeks.

Ronwin relies upon some language of this Court in the *Rodriguez* decision that he has taken out of context. When read in context, it is apparent that this Court's dictum in *Rodriguez* that "arbitration agreements . . . serve to advance the objective of allowing buyers of securities a broader right to select the forum for resolving disputes . . ." was not

intended to create a new substantive right for securities customers to be able to force securities broker-dealers to provide a securities account without a predispute arbitration agreement, as Ronwin contends.

In *Rodriguez*, this Court expressly overruled its own precedent in *Wilko v. Swan*, 346 U.S. 427 (1953), and held that securities customers who had signed a predispute arbitration agreement and had failed to meet the burden of proving that such agreement "resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract'" had no "'right to select the judicial forum'" over arbitration. 490 U.S. at 479-84. This Court further held in *Rodriguez*, as it had similarly held in *McMahon*, that "the right to select the judicial forum" in the federal securities acts was not a "substantive" right subject to protection under the antiwaiver provisions of those Acts, but a mere "procedural" provision that could be waived. 490 U.S. at 481-82 & 486; *see* 482 U.S. at 228.

In contrast, taking Ronwin's strained interpretation of the one sentence of dictum in *Rodriguez* that he relies upon to its logical conclusion, this Court in *Rodriguez* instead reaffirmed, not overruled, *Wilko v. Swan*. Ronwin construes *Rodriguez* to hold—contrary to this Court's express language

in that case—that a securities customer has an unrestricted choice of a judicial forum over arbitration and that such right is a substantive right. Thus, Ronwin's interpretation makes this Court's opinion in *Rodriguez* internally inconsistent.

Ronwin clearly cannot transpose a procedural right to select a judicial forum into a substantive right, nor can he use a procedural right to impose a concomitant substantive duty upon securities broker-dealers. When the *Rodriguez* opinion is read as a whole, the only reasonable meaning that can be given to the dictum in *Rodriguez* upon which Ronwin relies is that this Court was merely employing the same language it had used in *Wilko* concerning a customer's "'right to select the judicial forum'" to make the point that the validity of arbitration agreements and arbitral forums it was recognizing in *Rodriguez* would allow customers' claims under the Securities Act of 1933 to be heard in an additional forum that had not previously been available.

Ronwin attempt to bolster his meritless statutory claim with constitutional arguments is futile. Although Ronwin made no constitutional claims in his Complaint, he now argues that the First, Fifth and Fourteenth Amendments support his position. Even if his constitutional claims could now be heard, it is black letter law that the requirements of the United States Constitution and its Amendments apply

only to governmental entities or officials, not private parties like Smith Barney or John Spaustat. *See, e.g., Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349-50 (1974); *McCrory v. Rapides Regional Medical Center,* 635 F. Supp. 975, 980 (W.D. La.1986), *aff'd sub mem.*, 801 F.2d 396 (5th Cir. 1986).

In sum, there is no legal or factual basis for Ronwin's assertion that the District Court's opinion, as approved by the Eighth Circuit, was contrary to any decisions of this Court.

Ronwin fares no better in contending that his "refusal to be 'maneuvered into' a predispute arbitration agreement'" somehow creates a reason for his petition to be granted by this Court. Apparently now viewing his claim for breach of contract under Count III as intertwined with his purported "contract of adhesion" claim in Count II, Ronwin relies upon this Court's language in *McMahon* that if a broker "maneuvers" a customer into a predispute arbitration agreement, that provides grounds for revoking such agreement under ordinary principles of contract law. Ronwin argues that his "refusal to be 'maneuvered into' such an agreement," combined with his insistence on his purported "right to choose a judicial forum," provides grounds for his breach of contract claim in Count III.

However, even if Ronwin could somehow overcome the fact that he lacks a substantive right to choose a judicial forum, Ronwin's arguments are contrary to well-established and uniform federal law.

As an initial matter, Ronwin cannot avoid the long-accepted precept that a contract without a fixed term is terminable at will. *See Martin v. Equitable Life Assurance Society of the United States*, 553 F.2d 573, 574 (8th Cir. 1977); *Federal Deposit Insurance Corp. v. Northwood Projects, Inc.*, 95 Misc. 2d 373, 407 N.Y.S. 2d 424, 426-27 (1978); *Muller Enterprises, Inc. v. Samuel Gerber Advertising Agency, Inc.*, 182 Neb. 261, 153 N.W.2d 920, 924 (1967).

Further, Ronwin has failed to allege any circumstances of fraud, mistake, coercion or other grounds cognizable under common law for the revocation of contracts generally. Ronwin was not only not "coerced or defrauded into agreeing to the arbitration clause," *see Gilmer v. Interstate/Johnson Lane Corp.*, ___ U.S. ___, 111 S. Ct. 1647, 1656 (1991), he freely exercised his choice *not* to sign any arbitration agreement. Smith Barney in turn freely and legally exercised its choice *not* to do business with Ronwin in the absence of a predispute arbitration agreement. Ronwin cannot distinguish his claim from the federal court

decisions that—although recognizing the securities industry's superior bargaining power and general practice of requiring predispute arbitration agreements as a condition for a customer account—have uniformly denied customers' claims that arbitration clauses included in nonnegotiable brokerage agreements constitute unenforceable contracts of adhesion. *See Finkle and Ross v. A.G. Becker Paribas, Inc.*, 622 F. Supp. 1505, 1511-12 (S.D.N.Y. 1985); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. at 1655-56; *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. at 483-84; *David L. Threlkeld & Co. v. Metallgesellschaft Limited (London)*, 923 F.2d 245, 248 (2d Cir. 1991), *cert. dismissed*, ___ U.S. ___, 112 S. Ct. 17 (1991); *Adams v. Merrill Lynch, Pierce, Fenner & Smith*, 888 F.2d 696, 700 (10th Cir. 1989); *Webb v. R. Rowland & Co.*, 800 F.2d 803, 807 (8th Cir. 1986); *Pierson v. Dean Witter Reynolds, Inc.*, 742 F.2d 334, 339 (7th Cir. 1984).

Ronwin cannot escape the fact that if an arbitration agreement, after being signed by a securities brokerage customer, is not found to be an unconscionable contract of adhesion under general contract principles despite having been a condition precedent to a securities account, then a broker-dealer's request that a customer sign the same arbitration agreement in the same circumstances obviously

cannot constitute an illegal request subjecting the broker-dealer to an injunction or damages. *See id.*

Significantly, both Congress and the Securities and Exchange Commission to date have specifically declined to enact the legislation or regulation prohibiting mandatory predispute arbitration agreements that Ronwin is improperly seeking from this Court. *See* H.R. 4960, 100th Cong., 2d Sess., 134 Cong. Rec. 4992 (1988); *Order Approving Proposed Rule Changes Relating to the Arbitration Process and the Use of Predispute Arbitration Clauses,* Securities Exchange Act Release No. 34-26805, 43 S.E.C. Docket 1250, 1265, 54 Fed. Reg. 21,144, at 21,154-55 (May 10, 1989)(the "SEC Order").

As Ronwin admits in his Complaint, several securities broker-dealers allow cash securities accounts to be opened without execution of a predispute arbitration agreement. *See* Complaint ¶ XVI; *see also* SEC Order, *supra*, 43 S.E.C. Docket at 1265. Since Ronwin does not like the terms on which Smith reasonably has decided to conduct its business, Ronwin, like the "millions of Americans" whom he asserts are similarly affected, can simply choose to open a securities account at any or all of the other securities broker-dealers that will accept cash securities accounts without a predispute arbitration agreement.

CONCLUSION

In sum, no valid reasons exist for this Court to grant Ronwin's petition for writ of certiorari. No important issues of federal law need to be decided by this Court. The District Court's well-reasoned opinion and the Eighth Circuit's affirmance were in complete accord with this Court's governing decisions. Likewise, no conflict exists among the Circuit Courts for this Court to resolve regarding any issue raised by Ronwin's petition.

Dated: October 1, 1993.

Respectfully submitted,

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